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Supreme Court, U.S.
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No. 04-854

IN THE

Supreme Court of the United States

WILLIAM ETHRIDGE HILL, JR.,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the Texas Court of Appeals, Third Judicial District

REPLY BRIEF FOR PETITIONER

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Respondent does not dispute that *Missouri* v. *Seibert*, 124 S. Ct. 2601 (2004), altered the way courts must analyze the admissibility of warned confessions obtained on the heels of an earlier, unwarned confession. Br. in Opp. 3. Respondent concedes that applying the factors identified by the plurality in *Seibert* to petitioner's interrogation "*would* indeed lead one to conclude that the belated written *Miranda* warnings *were ineffective*." Br. in Opp. 5 (emphasis added). And respondent makes little effort to dispute that the approach in Justice Kennedy's *Seibert* concurrence would require a fundamentally different analysis than that employed by the courts below. See Pet. 25-27; pp. 5-6, *infra*.

Instead, respondent attempts to distinguish *Seibert* on novel grounds that have no basis in any of the *Seibert* opinions, that contradict the *Miranda* requirements that *Seibert* implements, and that rest on questionable inferences drawn from disputed facts. Consequently, the effort merely underscores the need for the Court to grant the petition, vacate the judgment below, and remand for reconsideration (GVR) in light of *Seibert*. As the Court has made clear, GVR is appropriate in cases where an intervening decision of the Court bears strongly on and has a reasonable likelihood of affecting the decision below. See *Lawrence* v. *Chater*, 516 U.S. 163, 167 (1996). That is precisely the case here.

I. The Two-Step Interrogation Technique Or Its Constitutional Equivalent Was Used

A. Respondent does not deny that, before petitioner gave his oral statement during "heavy duty" interrogation, the officers failed to warn him of the adversarial consequences of the statement—*i.e.*, that the statement could be used against him. Pet. 17; Pet. App. 44a. Respondent likewise concedes that the failure rendered petitioner's oral statement inadmissible, because the warning was "required to offset the potential coercive effects of custodial interrogation," Br. in Opp. 5, including the concededly aggressive tactics being used with petitioner. It "is only through an awareness of" the adversarial consequences "that there can be any assurance of

real understanding and intelligent exercise of the privilege." *Miranda* v. *Arizona*, 384 U.S. 436, 469 (1966).

Consequently, as respondent concedes, "the critical issue" is whether the later, written warning would have conveyed to "a 'reasonable person' in [petitioner's] shoes * * * that he had a real choice regarding signing the typewritten" statement, which did no more than memorialize the extensive oral statements petitioner already had given. Br. in Opp. 7. Far from curing the "ineffective[ness]" of the prior warnings, *ibid.*, the written *Miranda* warnings merely replicated and reinforced the constitutional defect. Officer Gilchrest incorrectly told petitioner that the written warnings were "[t]he same thing I told you before," 5/16/00 Hr'g Def. Exh. 2 at 234, *i.e.*, the same incomplete warnings given four hours earlier that nowhere advised petitioner that the statement could be used against him, *id.* at 48-49. That alone carried the constitutional defect that infected the earlier warnings into the later ones.

More important, *Seibert* makes it clear that the belated administration of a warning regarding adversarial consequences, *after* the individual has already spoken, *reinforces* the impression that invoking the right to silence is futile. As the plurality opinion explains, it leads to the "entirely reasonable inference that what [the individual] has just said" before receiving the warning "*will* be used" against him, making later silence "of no avail." 124 S. Ct. at 2611 (emphasis added); Pet. 18. That inference is particularly strong here. Petitioner was not asked to make additional statements. He instead was asked to sign a document memorializing the extensive oral statements already made in front of multiple officers. Petitioner thus had every reason to believe that invoking the right to remain silent would be a meaningless act.

Most important, Gilchrest's misrepresentation makes petitioner's case even stronger than *Seibert's*. By telling petitioner that the complete written warnings were the "same thing" given earlier, Gilchrest reinforced the danger articulated by the *Seibert* plurality, effectively advising petitioner that he had no constitutional objection to the use of his prior

oral statement. Here, more so than in *Seibert*, Gilchrest's prior reference to his earlier warnings was an "implicit suggestion that the mere repetition of the earlier statement was not independently incriminating. [That] implicit suggestion was false." 124 S. Ct. at 2615 (Kennedy, J., concurring). Thus, the police deprived petitioner of information critical to petitioner's ability to make an informed waiver of his *Miranda* rights.[1] Respondent bears the burden of proving a knowing and voluntary waiver. That burden has not been met.

B. Respondent nonetheless asserts that the provision of *incomplete* warnings before petitioner made his oral statement somehow rendered the later warnings "effective as a matter of law." Br. in Opp. 5. According to respondent, "the prior warnings * * * serve[d] as a catalyst for both" petitioner's "appreciation of his current situation and the subsequent understanding of the later warnings." *Ibid.* Even if that novel "catalyst" theory had some basis in *Miranda* or *Seibert*—and it does not—its application here proves the ineffectiveness of the written warnings on which respondent seeks to rely. Here, the belated mention of adversarial consequences would not "convey a message that [petitioner] retained a choice about," *Seibert*, 124 S. Ct. at 2613, confirming his prior statement, because it supports the opposite conclusion—the "entirely reasonable inference that" the identical oral statement petitioner had already given without proper warnings in front of multiple officers "will be used, with subsequent silence being of no avail." *Id.* at 2611.

Respondent's novel "catalyst" theory, moreover, rests on the false premise that the required warning of adversarial consequences is an inconsequential tag-along to the core right to remain silent that, according to respondent, the warning merely "serve[s] to support." Br. in Opp. 11, 12. *Miranda*

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[1] Respondent has no answer to this point. Instead, respondent mischaracterizes the *Seibert* plurality opinion as hinging on "voluntariness," Br. in Opp. 4, despite the fact that the opinion expressly disavows any assessment of the "actual voluntariness of [Seibert's] statement." 124 S. Ct. at 2613 n.8.

says the opposite, explaining that the warning is necessary to give teeth to the right to remain silent:

> [The] warning is needed in order to make [a suspect] aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system—that he is not in the presence of persons acting solely in his interest.

384 U.S. at 469; accord *Seibert*, 124 S. Ct. at 2611 (plurality opinion). The adversarial consequences warning is "an absolute prerequisite to interrogation." *Miranda*, 384 U.S. at 471. Respondent thus seeks to limit *Seibert*'s construction of *Miranda* using a theory that *Miranda* itself rejects.

Detective Gilchrest and his colleagues in this case, moreover, went to lengths to ensure that petitioner would *not* have concerns about potential adversarial consequences. Gilchrest and police officer James Drewry both testified that the camera videotaping the interview was hidden from petitioner to ensure he would not "worry" or "be concerned" that the tape "might be *used against [him]* in some court proceeding." Pet. 24-25 (emphasis added) (quoting 5/16/00 Hr'g Tr. 26-27, 182). So that petitioner would not worry about adversarial consequences, Gilchrest told petitioner that the focus of the investigation was on an accidental death, 5/16/00 Hr'g Tr. 152; that he wanted to discuss petitioner's "relationship with Bill Allen and everything that led up to his death," 5/16/00 Hr'g Def. Exh. 2 at 4; and repeatedly expressed sympathy for petitioner, urging him "we're just trying to get you to help yourself." *Id.* at 207; see also *id.* at 142 ("A lot of what I'm [Gilchrest] going to be able to do from this point on, almost everything to help you out, depends on what you tell me right now."); *id.* at 162-63 ("If I [Gilchrest] had walked in this room and you had said * * * It was a terrible accident, I didn't mean for it to happen, I got panicked, left, you know, by God, we can work with that.").

C. Respondent also intermittently suggests that *Seibert* is inapplicable because Officer Gilchrest did not intentionally omit the warning about adversarial consequences. Br. in Opp. 12, 13, 16-17; see 124 S. Ct. at 2616 (Kennedy, J., concurring). But eight members of this Court in *Seibert* concluded that the officer's subjective intent does not control. 124 S. Ct. at 2612 n.6 (plurality opinion); *id.* at 2618 (O'Connor, J., dissenting). Even if one were to assume that Officer Gilchrest's subjective intent controls here, whether Officer Gilchrest *intended* to omit the warnings is precisely the sort of *factual* issue that must be resolved by the state courts in the first instance. See, *e.g.*, *Wilson* v. *Arkansas*, 514 U.S. 927, 937 (1995) ("remand[ing]" case "to allow the state courts to make any necessary findings of fact and to make the determination * * * in the first instance").

As made clear in the petition, see pp. 24-25, and above, see pp. 4-5, *supra*, there is abundant evidence—including the strenuous efforts to keep petitioner from "worry[ing]" or "be[ing] concerned" that his statements "might be used against him later on"—from which a reasonable trier-of-fact could infer the omission was intentional. Cf. *United States* v. *Aguilar*, 384 F.3d 520, 525 (8th Cir. 2004) (relying on trial court's finding that "the method and timing of the two interrogations," standing alone, "establish intentional, calculated conduct by the police"). The federal courts of appeals in similar circumstances have declined to make factual findings regarding intent and instead have remanded on appeal for factfinding by the trial court. See *United States* v. *Stewart*, 388 F.3d 1079, 1091 (7th Cir. 2004).[2] *A fortiori* this Court

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[2] Where lower courts have found no evidence of the "two-step" strategy on a cold record, the first step has—in contrast with the extensive interrogation here—consisted of only a few spontaneous questions. See *United States* v. *Terry*, 400 F.3d 575, 582 (8th Cir. 2005) (single question without requestioning until the following day); *United States* v. *Fellers*, 397 F.3d 1090, 1098 (8th Cir. 2004) (initial conversation at the suspect's home "relatively brief" and included only a few topics eventually covered in the interrogation); *United States* v. *Johnson*, 354 F. Supp. 2d

should not make factual findings about a *state* officer's intent on a petition for a writ of certiorari to a *state* court. And respondent does not dispute that, if the police conduct was deliberate, *Seibert* applies.

Respondent, moreover, ignores the fact that the reasoning of Justice Kennedy's concurring opinion does not necessarily extend to the type of police conduct at issue here. See Pet. 25-27. That opinion excuses the failure to render *Miranda* warnings in the first instance where there is a legitimate excuse for doing so, such as where the officer makes a mistake because of the exigencies of the investigation, or stumbles on an ambiguity (such as the definition of "custody"). The opinion thus seeks to balance the goals of *Miranda* with countervailing "legitimate interests" implicated by *Miranda*'s application in the real world. 124 S. Ct. at 2614. Here, there are no such countervailing interests. Despite the participation of three experienced law enforcement agents in an elaborately planned and intensive interrogation with plenty of opportunity for the administration of timely and complete *Miranda* rights, the officers without objective excuse simply failed to meet their constitutional duty.

II. The Written Warning Did Not Function Effectively As *Miranda* Requires

Alternatively, respondent urges the Court to conclude that petitioner in fact understood his rights in light of "common sense," and his "experience dealing with police." Br. in Opp. 16, 18. But *Seibert* points in the opposite direction, as described above. Because Officer Gilchrest described the written warnings as the "same thing" petitioner was told before, the new warnings did nothing to cure the defects in the old ones. And because the belated warning about adversarial consequences supported an inference that the statement petitioner had already made would be used against him in any event, the warning could convince petitioner only that any

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904, 907 (W.D. Wis. 2005) ("The only question the officers posed * * * was whether there were drugs or guns in the apartment.").

refusal to sign was futile. Here, as in *Seibert*, the insertion of *Miranda* warnings "in the midst of a coordinated and continuing interrogation [was] likely to mislead and 'depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them.'" *Seibert*, 124 S. Ct. at 2611 (plurality opinion) (quoting *Moran* v. *Burbine*, 475 U.S. 412, 424 (1986)).

Respondent's assertion that petitioner could not "have thought his statements were nothing more than insignificant chatter in the interview room," Br. in Opp. 13, proves too much. The same thing could be said of any person subjected to intensive in-custody interrogation. This Court has not embraced the principle that a suspect should be deemed aware of (and able to exercise) his rights without being advised of them. For that reason, *Miranda* requires warnings to be given in every case. "[W]hatever the background of the person interrogated, a warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Miranda*, 384 U.S. at 469. Here, moreover, the officers used interrogation techniques—alternating between pressure and seduction—that present precisely the risk of coercion *Miranda* warnings are designed to redress.

Respondent likewise errs in claiming that petitioner must have understood his rights because, "for the first two-thirds of the interview," he "doggedly" denied that he had visited the victim. Br. in Opp. 14. It is utterly specious to suggest that every suspect who changes his story during an intense interrogation necessarily understands his *Miranda* rights. *Seibert*, moreover, analyzes whether a "reasonable person in the suspect's shoes" would have understood his rights *after* warnings have been administered. 124 S. Ct. at 2612-2613 (plurality opinion). It does not suggest that courts should speculate (based on ambiguous evidence) that an individual might have known his rights *before* being advised of them. The test is (as respondent admits) objective, not subjective. Br. in Opp. 5. If anything, here the fact that petitioner

accepted his interrogators' persistent representations that it would help him to admit having been at the crime scene demonstrates the importance of a timely adverse consequences warning as an "absolute prerequisite" to interrogation. See p. 4, *supra*.

Respondent's attempt to portray petitioner as someone with extensive "experience dealing with police," Br. in Opp. 16, is likewise unconvincing. This Court has squarely held that relying on a suspect's "prior law enforcement experience" is "improper when deciding when suspects should be advised of their *Miranda* rights" because that "inquiry turns too much on the suspect's subjective state of mind and not enough on the objective circumstances of the interrogation." *Yarborough* v. *Alvarado*, 124 S. Ct. 2140, 2152 (2004) (internal quotation marks omitted). Further, none of the incidents petitioner describes and respondent reprints, Br. in Opp. 8 11, involve petitioner having been read his *Miranda* rights; nor does respondent present any other evidence of petitioner's supposed experience. To the extent it is relevant, petitioner's rambling and naive presentation of his experiences merely underscores his vulnerability. Under the circumstances, the omitted warning about adversarial consequences was "the most critical"; the courts "can not be so presumptuous as to think that [the adversarial consequences warning] would be common knowledge to laymen." *United States* v. *Tillman*, 963 F.2d 137, 141 (6th Cir. 1992).[3]

Ultimately, respondent's argument that petitioner should have known the consequences of talking to police and its novel

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[3] The State's suggestion that *Miranda's* authorization of the use of "alternative[]" warnings permits the *omission* of particular warnings where a suspect may already know his rights, finds no support in this Court's precedents. Br. in Opp. 11. *Miranda* itself makes clear that any alternative formulation must be "a *fully effective equivalent*," not a partial warning that omits important elements. 384 U.S. at 476 (emphasis added); *Duckworth* v. *Egan*, 492 U.S. 195, 203 (1988) ("The inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by *Miranda*.'" (quoting *California* v. *Prysock*, 453 U.S. 355, 361 (1981) (per curiam)).

"catalyst" theory are insufficient to meet its burden of showing that petitioner "knowingly and intelligently" waived his rights. *Miranda*, 384 U.S. at 475. Any doubt regarding whether respondent has met its burden in light of the intervening decision in *Seibert* only reinforces the need to GVR.

Finally, respondent asserts the "formality" of the written statement "sever[ed]" it from the first-half of the interrogation. Br. in Opp. 17. But that assertion contradicts respondent's concession that "[a]pplication of" the five factors announced by the *Seibert* plurality to the "two 'rounds' of questioning" that occurred here "would indeed lead one to conclude that the written *Miranda* warnings were ineffective." Br. in Opp. 5. Surely if the wholly overlapping content of the two phases of interrogation were such that petitioner's review of the written statement could not be viewed as a new experience, the written statement could not have "sever[ed]" the second phase of the interrogation from the first.

Detective Gilchrest, moreover, expressly linked the two by introducing the typewritten statement to petitioner as the written version of the oral statement he had already given. 5/16/00 Hr'g Def. Exh. 2 at 233. Petitioner may have paid "attention to detail" when correcting the document. Br. in Opp. 17. But that hardly proves that petitioner, having already been told and having repeatedly been committed to the same story by two officers, should have understood that he had a real choice to make before signing the written version of his statement. See pp. 2-3, *supra*. Nor did the officers seek to cure the misapprehension created by their own conduct by, for example, informing petitioner that his prior oral statement was inadmissible. See *Seibert*, 124 S. Ct. at 2612 n.7 (plurality opinion); *id.* 2616 (Kennedy, J., concurring).[4]

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[4] The State notes that Gilchrest permitted petitioner to call his mother before retrieving his laptop and reducing Hill's oral statement to writing. Br. in Opp. 17 (citing "Trans.-209"). But unwarned questioning resumed immediately after that short break, and it was not until one hour later that petitioner was presented with the printed *Miranda* warnings and the written statement for signature. 5/16/00 Hr'g Def.

To the contrary, the written warnings, presented to petitioner together with a typed version of the oral statement petitioner had already made and repeated, could not have "convey[ed] a message that [petitioner] retained a choice about continuing to talk." *Seibert*, 124 S. Ct. at 2613 (plurality opinion). In fact, there was no *talking* left for petitioner to do. Petitioner "did not make a second statement after he finally received his *Miranda* warnings; he simply signed the written statement that he had dictated to [Gilchrest] before he was warned." *Jones* v. *State*, 119 S.W.3d 766, 775 (Tex. Crim. App. 2003). The belated warnings did not create "a new and distinct experience" for petitioner. *Seibert*, 124 S. Ct. at 2612 (plurality opinion). Rather, the warnings were presented as the "same thing" petitioner had heard before; the statement was merely the written version of what he had already repeatedly said; and any refusal to sign would have seemed a wholly futile act given that he had made the same statement repeatedly before multiple police officers. Under the circumstances, deeming the "statement admissible by virtue of the late admonishment of the required warnings would" not merely "undermine the spirit and intent of *Miranda*," *Jones*, 119 S.W.3d at 775, but the content of *Seibert* as well.[5]

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted, the judgment of the Texas Court of Appeals should be vacated, and the case remanded to that court for further consideration in light of this Court's intervening decision in *Seibert*. Alternatively, this Court should grant the petition and set the case for argument on the merits.

Exh. 2 at 209-234. The short break, immediately followed by more unwarned questioning, cannot by any stretch have suggested "that the interrogation ha[d] taken a new turn." *Seibert*, 124 S. Ct. at 2616 (Kennedy, J., concurring).

[5] Respondent also musters no response to petitioner's point that the written statement should have been excluded even under the standards of *Oregon* v. *Elstad*, 470 U.S. 298 (1985). Pet. 21-22.

Respectfully submitted,

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